Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

Respondent National Association of Broadcasters respectfully requests that this Court deny the petition for a writ of certiorari filed herein on February 20, 1987, to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 19, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reprinted as Petitioners' Appendix ("Pet. App.") A (pp. 1a-38a), has now been

reported at 801 F.2d 501. The opinion of the Court of Appeals denying Petitioners' suggestion for rehearing *en banc*, reprinted as Pet. App. E (pp. 137a-151a), has now been reported at 806 F.2d 1115.

ARGUMENT

I. THE ISSUE PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT

The fairness doctrine requires broadcasters to provide coverage of controversial issues of public importance and to provide a reasonable opportunity for the presentation of contrasting views on those issues. The question which Petitioners have presented to this Court for review—whether the 1959 amendments to Section 315 of the Communications Act made the fairness doctrine a statutory requirement—should not be considered by this Court. The Court of Appeals' decision is fully consistent with decisions of this Court and of the only other circuit to consider this question, and the decision below is clearly correct.

When the Radio Act of 1927, the predecessor of the Communications Act of 1934, was enacted, it contained no fairness doctrine. To the contrary, Congress had rejected proposals to require the presentation of opposing views on public issues.[1] Although legislative efforts statutorily to require the doctrine continued to be defeated,[2] the Federal Radio Commission, predecessor of the Federal Communications Commission ("Commission" or "FCC"), began, as early as 1929, to develop on a case-by-case basis a concept of fairness in broadcasters' treatment of

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[1] *See* S. Rep. No. 772, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 5560 (1926).

[2] *See, e.g.*, H.R. Rep. No. 2106, 72d Cong., 2d Sess. 4 (1933); S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); 78 Cong. Rec. 10988 (1934).

public issues.[3] The fairness doctrine was first articulated in its present form by the Commission in 1949 in its *Report on Editorializing*.[4] When Congress exempted news and news-related programs from the equal opportunities requirement of Section 315 of the Communications Act, it made reference to the fairness doctrine.[5]

The language and legislative history of these 1959 amendments were interpreted by this Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There this Court rejected the contention that the fairness doctrine was not authorized by the public interest standard of the Comunications Act:

> "Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act *authorized* the Commission to require licensees to use their stations for discussion of public issues . . . ." [6]

At the same time the Court made plain that the 1959 amendments to Section 315 did not require the fairness doctrine. The Court found that the reference to the fairness doctrine in the 1959 amendments was an effort to "preserve" that administrative doctrine in the newly exempted areas: "Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts." [7] Specifically, the Court found that the defeated

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[3] *See, e.g., Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 599 (1930).

[4] 13 F.C.C. 1246 (1949).

[5] The text of Section 315 of the Communications Act is set out in the Petition for a Writ of Certiorari ("Pet.") at 2-3.

[6] *Red Lion*, 395 U.S. at 382 (emphasis supplied).

[7] *Id.* at 385. Elsewhere the Court stated that Congress had "ratified" the Commission's efforts. *Id.* at 381.

Proxmire amendment to the 1959 amendments, which would have "constituted a positive statement of the [fairness] doctrine," was altered "to the present *merely approving* language in the conference committee." [8]

In several subsequent decisions, this Court has reaffirmed its interpretation of the 1959 amendments. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS v. DNC"*), for example, the Court stated that Congress, in 1959, had given "statutory approval" to the fairness doctrine,[9] and observed that the Commission "does not intend to discard" the doctrine,[10] thus suggesting that the Commission had authority to do so.[11] Similarly, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court stated that "the Commission may, in the exercise of its discretion, decide to modify or abandon these [fairness doctrine] rules," [12] again suggesting that the fairness doctrine was not a statutory requirement.

The only other circuit expressly to consider this question has concluded that the "fairness doctrine is not a creature of statute . . . ." [13] In *Public Interest Research*

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[8] *Id.* at 383-84 (emphasis supplied).

[9] 412 U.S. at 110 n.8.

[10] *Id.* at 132.

[11] In one place, however, the Court did refer to the fairness doctrine as a "statutory obligation" that was "imposed" by Congress. *Id.* at 129.

[12] 468 U.S. at 379 n.12.

[13] *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). Although the Fourth Circuit in *Larus & Brother Co. v. FCC*, 447 F.2d 876, 882 (4th Cir. 1971), has stated in passing that Section 315 "provides a statutory basis" for the fairness doctrine, and the Fifth Circuit in *Muir v. Alabama Educational Television Commission*, 656 F.2d 1012, 1021 n.17 (5th Cir. 1981), *rehearing en banc*, 688 F.2d 1033 (1982), *cert. denied*, 460 U.S. 1023 (1983), has made reference in a footnote to the fairness doctrine's "codifi[cation]," neither of these cases contained any analysis of the statutory question nor was that question an issue in either case.

Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), the First Circuit held that the Commission acted within its statutory authority when it excluded from the fairness doctrine those product commercials which did not explicitly address a public issue.[14] In rejecting the argument that Congress had " 'codified' both the fairness doctrine and the Commission's former application of it to product ads," the Court adopted the view that Congress, in 1959, merely "acknowledged and generally endorsed the Commission's adoption of fairness standards." [15]

The correctness of this view that the fairness doctrine is not a statutory requirement is confirmed by the language and legislative history of the statute.

The reference to the fairness doctrine in the 1959 amendments was in a proviso which stated:

> "*Nothing in the foregoing . . . shall be construed as relieving broadcasters*, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this chapter* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." [16]

Contrary to Petitioners' suggestion (Pet. 13), this language, by its terms, does not command compliance with, or enforcement of, the fairness doctrine. (Pet. App. A, 34a-35a.) Rather, the language states only that "the foregoing sentence"—containing the newly created equal time exemptions for news programs—should not be construed as also "relieving" broadcasters in the presentation of such news programs from the fairness obligations

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[14] 522 F.2d at 1066-67.

[15] *Id.* at 1066.

[16] 47 U.S.C. § 315(a) (1982) (emphasis supplied).

already "imposed upon them under this [Act]." This is the classic formulation of a "savings" clause or proviso.[17] As the Court below correctly found, this reference to fairness requirements " 'imposed . . . under the Act' . . . suggests that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act." (Pet. App. A, 35a.)

The legislative history confirms that this was the sole function of the language. During consideration of the 1959 amendments, both the Department of Justice and the Commission expressed concern that in exempting news programs from the statutory equal time requirements, Congress should not inadvertently suggest that the Commission's fairness doctrine would no longer apply to such broadcasts.[18] In response to these concerns, the Senate Committee stated in its report that it wished to make "crystal clear" that the amendment would not affect the Commission's existing policy.[19]

Senator Proxmire, however, was not content with this approach. During the floor debates on the Senate bill, he sought to make the fairness doctrine a congressional

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[17] *See* 2A Sutherland, *Statutory Construction* §§ 47.09, 47.12 (4th ed. 1984); *see also Stearns v. Hertz Corp.*, 326 F.2d 405, 407 (8th Cir.), *cert. denied*, 377 U.S. 934 (1964).

[18] *Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 75, 309, & n.3 (1959); *Political Broadcasts—Equal Time: Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 13, 122 & n.6 (1959). There was no suggestion by either the Department or the Commission that Congress should act to codify the doctrine.

[19] S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

requirement and offered a modification that provided that nothing in the 1959 amendments to Section 315 should be construed to change *"the basic intent of Congress . . .* which recognizes that . . . all sides of public controversies *shall* be given as equal an opportunity to be heard as is practically possible" in all of the exempted categories of news programs.[20] With minor modifications, the Proxmire amendment was adopted and appeared in the final version of the Senate bill.[21]

The House substitute contained no provision comparable to the Proxmire amendment. Instead, the House bill, like the original Senate bill, simply exempted news programs from the equal time requirements of Section 315.[22] In conference, the Proxmire amendment was included in the final bill, but was modified to eliminate the statement ascribing the general fairness obligations to "the basic intent of Congress." Instead, as noted above, the final language referred to the fairness requirements as being "imposed . . . under" the Act. The conferees did not view themselves as enacting a new statutory obligation, but rather intended to recognize the Commission's authority to enforce the fairness doctrine under the Act and to ensure that the exemptions to Section 315 were not read to abrogate that authority.[23] As

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[20] 105 Cong. Rec. 14457 (1959) (emphasis supplied).

[21] *Id.* at 14457, 14463.

[22] H.R. Rep. No. 802, 86th Cong., 1st Sess. 2 (1959).

[23] *See* H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4-5 (1959), *reprinted at* 105 Cong. Rec. 17777 (1959) (emphasis supplied); *see also* 105 Cong. Rec. 17778 (1959).

This view of the scope of the 1959 amendments to Section 315 has been shared by a 1968 congressional staff study, *see Staff Study of the House Comm. on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine,* 90th Cong., 2d Sess. 29 (1968) (the "suggest[ion] that Congress, in its enactment of the 1959 amendments, intended neither approval nor disapproval of the Fairness Doctrine, but intended to insure that Section 315 would

this Court concluded in *Red Lion*, the conferees modified the Proxmire Amendment from a "positive statement" to "merely approving language." [24]

Absent any clear expression of congressional intent to make the fairness doctrine a statutory requirement, it would be wholly inappropriate to view Congress as seeking inflexibly to codify Commission requirements such as the fairness doctrine when changing conditions might well make modification or abandonment of the requirements appropriate.[25]

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not interfere with it . . . appears to be a more accurate reading of the legislative history than the alternative one that Congress intended a complete codification of the doctrine"), and by several commentators, *see, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 134 (1967) (concluding that 1959 amendments preserved but did not require the fairness doctrine); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 Fed. Comm. B.J. 75, 81-82 (1969) (same).

Recently, the question of whether the fairness doctrine is a statutory requirement was considered by the Commission in its 1985 *Fairness Doctrine Report*. Although, after considering the legislative history of the 1959 amendments, the Commission declined to "reach a definitive conclusion" on whether retention of the doctrine statutorily was mandated, the Commission did conclude that there is "no evidence that clearly demonstrates an intent by Congress to codify the doctrine." *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 240, 246 (1985) ("*Fairness Doctrine Report*").

[24] *See supra* at pp. 3-4.

[25] *See* Pet. App. E, 151a (separate statement of Bork, J., supporting denial of rehearing *en banc*); *see also CBS v. DNC*, 412 U.S. at 122 (Commission requires "the flexibility to experiment with new ideas as changing conditions require"); *id.* at 118 (opinion of Burger, C.J.) (recognizing the importance of giving the Commission "flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing programs and needs"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (citation omitted) ("the public-interest standard of the Act [was designed to

II. IN ANY EVENT, THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR A DETERMINATION OF THE STATUTORY ISSUE

A number of other important considerations strongly counsel in favor of denial of the writ.

First, this case arises in the context of the Commission's decision not to apply the fairness doctrine to teletext, a new technology which utilizes a previously unused portion of the television broadcast signal to transmit textual data and graphics, information which can be received with the use of a decoder. (Pet. App. A, 3a-4a.)

Assuming *arguendo* that Congress had intended in 1959 to make the fairness doctrine a statutory requirement as to general purpose broadcasting, there is no indication that Congress also intended to make the doctrine a statutory requirement for new technologies, such as teletext, which had not yet been developed and which have characteristics that differ substantially from traditional broadcasting.

In any event, teletext has been utilized in the United States only to a limited extent, generally on an experimental basis.[26] The application of the fairness doctrine to this new technology and the issue of whether the statute requires the fairness doctrine for teletext are not sufficiently important questions to warrant review by this Court.

Second, the fairness doctrine raises substantial constitutional questions. Although this Court's decision in *Red Lion* held that the fairness doctrine was constitu-

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serve as] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy' "); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

[26] *In the Matter of Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, BC Docket No. 81-741 (released Jan. 24, 1985), reprinted as Pet. App. C, at 117a.

tional, this question is now properly being reconsidered. In *Red Lion*, this Court recognized the appropriateness of reexamining the doctrine's constitutionality if it were shown to have inhibitory effects.[27] And, in *League of Women Voters*, this Court explained that it would reconsider the question of the doctrine's constitutionality if given a "signal" by the Commission that the doctrine inhibited broadcaster speech or that "technological developments" made revision to the system of broadcast regulation appropriate.[28]

In 1985, after an exhaustive inquiry into the constitutionality and desirability of the fairness doctrine, the Commission gave this Court such a "signal." In its comprehensive *Fairness Doctrine Report*, the Commission found that the fairness doctrine substantially inhibits the broadcasting of controversial issues, is unnecessary, and is unduly intrusive into broadcaster editorial judgment.[29] Based on these findings, the Commission decided that the doctrine is constitutionally "suspect" [30] and concluded:

> "[w]ere the balance ours alone to strike, the fairness doctrine would . . . fall short of promoting those interests necessary to uphold its constitutionality." [31]

This conclusion was based on the extensive record evidence before the Commission and on the Commission's years of experience in enforcing the doctrine.

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[27] 395 U.S. at 373.

[28] 468 U.S. at 377 n.11, 378-79 n.12.

[29] 102 F.C.C.2d at 156.

[30] *Id.*

[31] *Id.* In this *Report*, the Commission also found that the fairness doctrine no longer served the public interest. The Commission announced, however, that it would continue to administer and enforce the fairness doctrine given the "intense Congressional interest in the fairness doctrine and the pendency of legislative proposals" to repeal the doctrine. *Id.* at 247.

The question of whether the FCC constitutionally can continue to enforce the doctrine in light of these findings is now the subject of at least one proceeding at the Commission [32] and is pending before the Court of Appeals for the District of Columbia Circuit.[33]

The serious First Amendment concerns raised by the application of the fairness doctrine to the traditional broadcast media should be taken into consideration by this Court in determining whether Section 315 made the fairness doctrine a binding statutory requirement since

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[32] Following the Court's decision in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), discussed *infra* at note 33, the Commission initiated a proceeding to determine whether the Commission should eliminate the fairness doctrine, *inter alia*, on constitutional grounds. *See Complaint of Syracuse Peace Council*, 52 Fed. Reg. 2805 (1987). The Commission is also conducting an inquiry into fairness doctrine enforcement alternatives mandated by Congress in the Joint Resolution Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 407 (1986). *See Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 52 Fed. Reg. 7626 (1987).

[33] The Commission's actions in this *Report* are currently on review in the District of Columbia Circuit in *Radio-Television News Directors Association v. FCC*, No. 85-1691 (filed Oct. 22, 1985) (*"RTNDA"*). Although a panel of that Court originally concluded that it did not have jurisdiction to consider Petitioners' claim that, in light of these findings, the Commission's decision to continue to enforce the fairness doctrine and to decline to take action to eliminate the doctrine was unconstitutional, *RTNDA*, 809 F.2d 860, 863 (D.C. Cir. 1987), the panel has ordered rehearing of this jurisdictional question. Consideration of the merits of this case has been postponed pending completion of the Commission's proceeding on remand in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), a companion case to *RTNDA*, in which the Court of Appeals held that the Commission had no discretion to decline to consider an argument by a broadcaster held to have violated the fairness doctrine that the agency could not constitutionally enforce the doctrine against it.

this Court routinely construes statutes to avoid passing on their constitutionality.[34] This case does not directly present these constitutional issues.

Moreover, the record on the constitutionality of the fairness doctrine has been developed in the context of general purpose broadcasting, which has characteristics that differ significantly from those of teletext. The question of whether the fairness doctrine is a statutory requirement is thus more appropriately considered by this Court in a case in which the constitutionality of the doctrine is directly presented and which involves its application to traditional broadcasting.

Third, considerations of judicial economy also militate in favor of a denial of the petition. The statutory question presented in this case as to the effect of the 1959 amendments to Section 315 would become moot if Congress enacted legislation making the fairness doctrine a statutory requirement.

Following the Court of Appeals' decision in this case, bills were introduced in the House and the Senate statutorily to require the fairness doctrine.[35] This legislation was approved by the Senate on April 21, 1987.[36] The Telecommunications and Finance Subcommittee of the House Energy and Commerce Committee held hearings on this legislation on April 7, 1987, and the full Committee ordered the bill reported on May 13, 1987.[37]

Should this legislation be enacted into law, the statutory issue currently before this Court would be rendered

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[34] *See United States v. Clark*, 445 U.S. 23, 27 (1980); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring).

[35] S. 742, 100th Cong., 1st Sess. (Mar. 12, 1987) (sponsored by Sen. Hollings); H.R. 1934, 100th Cong., 1st Sess. (Apr. 2, 1987) (sponsored by Rep. Dingell).

[36] 133 Cong. Rec. S5232 (daily ed. Apr. 21, 1987).

[37] 133 Cong. Rec. D670 (daily ed. May 13, 1987).

moot. Moreover, even if this legislation were not enacted into law, there are at least two other cases pending in the court of appeals and at the Commission which present the issue of whether the 1959 amendments to Section 315 made the fairness doctrine a statutory requirement in the context of traditional broadcasting.[38] In light of these considerations, the Court should decline to exercise its discretion to hear this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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May 15, 1987

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[38] *See supra* notes 32 & 33.